In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-846

B. DALE BALL, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF THE STATE OF MICHIGAN, ET AL., PETITIONERS

v.

ARMOUR AND COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

This memorandum is filed pursuant to the Court's order of February 20, 1973, inviting the Solicitor General to express the views of the United States in this case. We discuss only the preemption issue since that is the only question that directly involves the United States.

STATEMENT

Respondents, who manufacture a variety of sausage and other meat products, brought this suit for declaratory and injunctive relief against the administrators of the Michigan Comminuted Meat Law. They contended that the labeling and ingredient requirements of the

Michigan statute were preempted by Section 408 of the Federal Meat Inspection Act, 21 U.S.C. 678.[1]

Without reaching the preemption issue, the district court granted summary judgment to the State officials (Pet. App. 1a-14a). The court denied declaratory and injunctive relief on the grounds that the plaintiffs had not shown irreparable injury (Pet. App. 4a-11a) and that they lacked "equity and good conscience" (Pet. App. 13a).

On appeal the Sixth Circuit reversed and remanded to the district court for further proceedings. The court of appeals held that the threatened enforcement of State law rendered declaratory relief appropriate. On the merits, the court held that, "in view of its unambiguous language, Section 408 [proscribing State labeling and ingredient requirements 'in addition to, or different than, those made under this chapter'] reflects unequivocal legislative purpose to make the Federal Act preemptive" (Pet. App. 33a).

DISCUSSION

1. Federal regulation within an area of congressional competency preempts state regulatory power where "the Congress has unmistakably so ordained." *Florida*

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[1]The main issues concerned Michigan's requirements (1) that sausage be labeled "Grade 1," and, as such, that it contain only skeletal meat and no organs or meat by-products; and (2) that such products contain at least 12 percent protein (Pet. App. 26a).

The federal statute and implementing regulations do not use or require the classification or label "Grade 1" on sausage products: they permit the use in such products of edible organs and meat by-products; and they do not require a 12 percent protein content, but provide a formula which calls for 11.2 percent protein. See 9 C.F.R. 317.2(c), 319.140—319.144, and 319.180. See also the appendix to the court of appeals opinion (Pet. App. 35a-40a).

Avocado Growers v. *Paul,* 373 U.S. 132, 142; *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230. Congress has explicitly precluded the states from imposing additional requirements upon meat that has been federally inspected under the Federal Meat Inspection Act. Section 408 of that Act (21 U.S.C. 678) provides:

> Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State * * * with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter * * *.[2]

Pursuant to his statutory authority (21 U.S.C. 607(c)) the Secretary of Agriculture has prescribed both labeling requirements and "standards of identity or composition" for meats and meat products distributed in interstate commerce, including comminuted meat (sausage) products. 9 C.F.R., Parts 317, 318, 319.[3]

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[2]See also S. Rep. No. 799, 90th Cong., 1st Sess., 18: "Section 408 [of the Federal Meat Inspection Act] would exclude States * * * from regulating operations at plants inspected under title I or from imposing marking, labeling, packaging, or ingredient requirements in addition to or different than those under the Federal Meat Inspection Act for articles prepared under inspection in accordance with title I of the Act * * *."

[3]The Secretary's power to inspect packing establishments (21 U.S.C. 603 *et seq.*) and to prescribe labeling and ingredient requirements for meat products prepared at such establishments (21 U.S.C. 607) does not ordinarily extend to establishments whose products are not distributed in commerce (*i.e.*, intrastate establishments); the States retain jurisdiction over such establishments and the products thereof, under 21 U.S.C. 661(a)(1), subject to the provisions of 21 U.S.C. 661(c)(3), authorizing the application of titles I and IV of the Federal Meat Inspection Act to intrastate establishments if the State does not provide standards at least as stringent as the federal standards.

Respondents' products were all prepared at federally-inspected establishments in accordance with subchapter I of the Act, and presumably met the federally-prescribed labeling, identity and composition standards. Section 408 therefore bars the State of Michigan from imposing upon those products the additional labeling and ingredient requirements of its law.

Petitioners argue that Congress "could only have intended preemption at the manufacturing end of the stream of commerce leaving the states free to continue regulation at the distribution end" (Pet. 10). Labeling and ingredient requirements, however, as a practical matter can only be met at the manufacturing point, *i.e.*, the place where sausage products are prepared and packaged. Moreover, the requirements are intended "to prevent and eliminate burdens upon [interstate] commerce" and to protect the "health and welfare of consumers." Federal Meat Inspection Act, Section 2 (21 U.S.C. 602) (see Pet. App. 69a-70a). It would have been anomalous for Congress, concerned, among other things, with burdens on interstate commerce, expressly to have preempted labeling and ingredient requirements at federally-inspected packing establishments, but to permit the States to impose different standards after the product has left the packing establishment on its way to the consumer.

2. Petitioners also argue that the Michigan labeling and ingredient requirements cannot constitutionally be preempted, since they are imposed "to protect the health of its citizens" (Pet. 8, 12).[4] The federal law,

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[4] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, relied on by petitioners, held that an Arizona regulation on packaging of cantaloupes, as applied to cantaloupes shipped outside the State for packaging, was an unconstitutional burden on interstate commerce, in view of the lack of a substantial local public interest in such packaging requirements. No federal regulation or preemption question was involved.

of course, has the same purpose—to protect "the health and welfare of consumers" (21 U.S.C. 602).[5] Congress has the power to protect the public health through regulation of food items distributed in commerce. *Pittsburgh Melting Co.* v. *Totten,* 248 U.S. 1, 8; *McDermott* v. *Wisconsin,* 228 U.S. 115, 128. In exercising a constitutional power "Congress may, if it chooses, take unto itself all regulatory authority * * *." *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230.

This conclusion is not affected by the second clause of the preemption provision of 21 U.S.C. 678, which provides:

> but any State * * * may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment * * *.

The meaning of this provision—read in the context of the preemption clause of which it is a part—is clear. States are permitted to take appropriate action for the purpose of "preventing the distribution * * * of

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[5]Section 10(b) of the federal Act, 21 U.S.C. 610(b), prohibits the sale, transport or offer for sale or transportation of meat which is "adulterated." Section 1(m) of the Act, 21 U.S.C. 601(m), defines "adulterated" as including any meat or meat product "if it bears or contains any poisonous or deleterious substance which may render it injurious to health." Thus, the federal statute specifically prohibits the sale of adulterated meats and is therefore directly concerned with "assur[ing] consumers of wholesome and healthy meat products." S. Rep. No. 799, 90st Cong., 1st Sess., 3.

* * * articles which are adulterated or misbranded." This permits the states to aid in implementing the federal standards by moving against articles not in a federally-inspected plant that are adulterated or misbranded. The clause does not authorize the states, however, to impose additional labeling or ingredient requirements upon products prepared at federally inspected establishments.

CONCLUSION

The court of appeals correctly held that the federal law preempts the Michigan law. The petition for a writ of certiorari should be denied with respect to the first two questions presented, which deal with this issue.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

CERTIORARI DENIED